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IN THE

Supreme Court of the United States

THOMAS E. KEMP (Chairman, Oklahoma Tax Commission), JERRY JOHNSON (Vice Chairman, Oklahoma Tax Commission), CONNIE IRBY (Secretary-Member, Oklahoma Tax Commission), BRAD HENRY (Governor), and HOWARD HENDRICK (Director, Oklahoma Department of Human Services),

Cross-Petitioners,

v.

HAROLD E. HILL, MARGARET R. AND WILLIAM F. McCRIGHT, JOHN J. McQUEEN, RITA J. MOSKOWITZ, BARBARA SANTEE, and OKLAHOMA RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE EDUCATION FUND, INC.,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In remanding to the district court claims asserted by a non-profit organization challenging the constitutionality of certain eligibility criteria for state financing of adoption-related activities (after the organization applied for and was denied such funding by the state), did the court of appeals correctly invoke the "exception" to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), where the organization's claims *(a)* allege serious violations of federal law, *(b)* are brought against state officials solely in their official capacities, each with sufficient enforcement connection to the challenged statutory provisions, and *(c)* seek relief that is prospective in substance and is not the functional equivalent of impermissible retrospective relief?

CLARIFICATION OF PARTIES TO THE PROCEEDING

Harold E. Hill, Margaret R. and William F. McCright, John J. McQueen, Rita J. Moskowitz, and Barbara Santee each was a plaintiff-appellant in the proceedings below, and each is a Petitioner in this Court with respect to pending Case No. 07-297. Although the caption to the conditional cross-petition identifies these six individuals as Cross-Respondents, the remainder of the conditional cross-petition (including its description of parties to the proceeding) makes clear that the only actual Cross-Respondent is Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"). ORC was a plaintiff-appellant in the proceedings below, but is not a Petitioner in Case No. 07-297 because the court of appeals remanded ORC's wholly independent claims to the district court.

CLARIFICATION OF RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Cross-Respondent Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC") is a non-profit organization established under Section 501(c)(3) of the Internal Revenue Code. ORC is a state affiliate of Religious Coalition for Reproductive Choice, also a national non-profit organization. No parent corporation or publicly held company owns 10% or more of ORC's stock.

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INTRODUCTION

The district court below was presented with two sets of plaintiffs each asserting independent claims, challenging separate statutory provisions, and seeking different forms of relief. All plaintiffs appealed the district court's dismissal of their claims for lack of jurisdiction. The court of appeals affirmed the district court's ruling with respect to one set of plaintiffs ("Motorists"), but reversed the district court's ruling with respect to the other plaintiff (Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc., or "ORC"). Motorists timely filed in this Court a petition for a *writ of certiorari* (No. 07-297) seeking review of the dismissal of their claims (Counts One through Four of the First Amended Complaint). Cross-Petitioners have opposed Motorists' pending petition, and additionally have filed this conditional cross-petition asking the Court to review the court of appeals' decision to remand ORC's claims (Counts Five and Six of the First Amended Complaint)—but *only if* the Court elects to review Motorists' pending petition seeking review of the court of appeals' *unrelated* decision as to Motorists' *unrelated* claims.

Cross-Petitioners' willingness to litigate ORC's claims with no further review by this Court in the event Motorists' petition is denied speaks volumes about the frivolous nature of their conditional cross-petition. Indeed, Cross-Petitioners do not put forth even a pretense of offering any compelling reason for review of the court of appeals' decision as to Counts Five and Six. The conditional cross-petition *(a)* does not identify any conflict between the court of appeals' decision and

this Court's prior decisions, *(b)* does not identify any circuit split created by the court of appeals' decision, and *(c)* does not identify any important questions that should be, but have not yet been, decided by this Court.

When stripped of its misstatements and omissions of relevant facts, the conditional cross-petition reflects simply that Cross-Petitioners disagree in principle with the "exception" to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), and further disagree with the court of appeals' application of that now well-established exception to ORC's claims. That Cross-Petitioners are unhappy with the remand of Counts Five and Six provides no reason—let alone a compelling one—for this Court to review the court of appeals' comprehensive and well-reasoned decision as to ORC's claims. Further review would, in any event, reveal that the court of appeals correctly applied the *Ex parte Young* exception to sovereign immunity in remanding ORC's claims to the district court.

CLARIFICATION OF STATUTORY PROVISIONS INVOLVED

The conditional cross-petition identifies 47 Okla. Stat. §§ 1104 through 1136 as "the challenged tax scheme." However, the only statutory provisions challenged by ORC are Sections 1104.6(C)(4) and (D), which contain two (among many other) eligibility criteria for state financing of adoption-related activities under the Choose Life Assistance Program. (Motorists, in

contrast, challenge only Sections 1135.1 through 1135.8.)[1] The eligibility criteria challenged by ORC—*i.e.*, Sections 1104.6(C)(4) and (D)—are included in Appendix F to Motorists' petition (157a-160a). For the Court's convenience, Section 1104.6 is reproduced in its entirety herein as Appendix A (1a-4a).

COUNTER-STATEMENT OF THE CASE

Cross-Respondent ORC submits this counter-statement of the case to address misstatements and omissions of fact that bear on which issues properly would be before the Court if the conditional cross-petition were granted.

A. Oklahoma's Choose Life Assistance Program.

Oklahoma's Vehicle License and Registration Act requires that $20 of the $35 paid by motorists who opt to purchase a special license plate bearing the expression "choose life" must be deposited by the state into the Choose Life Assistance Program Revolving Fund (the

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[1] Motorists' petition challenges Sections 1135.1 through 1135.8 (*i.e.*, the "special license plate scheme"). The special license plate scheme is reproduced as Appendix E to Motorists' petition (75a-140a). Appendix F to Motorists' petition (141a-168a) consists of Sections 1104 and 1104.1-1104.15. The statutory provisions reproduced in Appendix F are referenced throughout the special license plate scheme and are relevant to the question of whether the amount voluntarily paid for a special license plate is or is not a "tax" for purposes of the Tax Injunction Act. That question, like Motorists' independent claims challenging the special license plate scheme, is neither presented nor implicated by the conditional cross-petition.

"Fund"). 47 Okla. Stat. § 1104.6(A) (ORC Opp'n App. A, 1a). Each dollar deposited into the Fund:

> shall be distributed at the beginning of each fiscal year in a pro rata share to all nonprofit organizations that provide services to the community that include counseling and meeting the physical needs of pregnant women who are committed to placing their children for adoption.

Id. § 1104.6(B) (ORC Opp'n App. A, 1a).

Section 1104.6(C) requires that any non-profit organization seeking a disbursement from the Fund must first provide to the Oklahoma Department of Human Services ("OKDHS") an affidavit attesting to the organization's understanding that, among other things:

- 60% of the funds received can be used only to provide for *(a)* the material needs of pregnant women who are committed to placing their children for adoption, including clothing, housing, medical care, food, utilities, and transportation, and/or *(b)* infants awaiting placement with adoptive parents (*Id.* § 1104.6(C)(6); ORC Opp'n App. A, 3a); and

- 40% of the funds can be used only for adoption, counseling, training, or advertising (*Id.* § 1104.6(C)(6); ORC Opp'n App. A, 3a); and

- None of the funds received can be used for administrative expenses, legal expenses, or capital expenditures (*Id.* § 1104.6(C)(7); ORC Opp'n App. A, 3a); and

- Any unused funds at the end of the fiscal year that exceed 10% of the funds received during that year must be returned to the Fund (*Id.* § 1104.6(C)(8); ORC Opp'n App. A, 3a-4a); and

- Recipients must submit to an annual audit verifying that all disbursements were used in the manner prescribed by the statute (*Id.* § 1104.6(C)(9); ORC Opp'n App. A, 4a).

Section 1104.6(C)(4) specifically requires the applicant organization to attest in its affidavit that it:

> is not involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising.

Id. § 1104.6(C)(4) (ORC Opp'n App. A, 2a). This requirement is reiterated in Section 1104.6(D), which instructs in relevant part that:

> Funds may not be distributed to any organization that is involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing

> medical abortion-related procedures, or pro-abortion advertising[.]

Id. § 1104.6(D) (ORC Opp'n App. A, 4a).

B. Cross-Respondent ORC's Claims and Requested Relief.

ORC provides various services to assist pregnant women. For example, ORC provides telephone counseling on all reproductive options available to women with unplanned pregnancies. Some options include parenting, adopting, foster care and abortion. ORC accepts counseling referrals from other organizations and may also refer women to other organizations for counseling. In addition, ORC maintains a "Roe Fund" to help cover the costs (including child care, travel, overnight accommodations and medical care) incurred by impoverished pregnant women who have decided that abortion is the appropriate option given their personal circumstances. First Am. Compl. ¶ 24 (Henry/ Hendrick Pet. Opp'n App. 7-8).

ORC also engages in various activities to express support for choice in family planning. For example, on at least a monthly basis, ORC members and volunteers stand as a non-confrontational and peaceful presence outside health facilities providing abortion services. ORC also sponsors periodic worship, fellowship and educational gatherings for community members who wish to express support for choice in family planning. In addition, ORC promotes the Clergy for Choice Network of the Religious Coalition for Reproductive Choice, which is a national registry of clergy of all faiths

who support family planning, including access to safe, legal and affordable adoption and abortion services. *Id.* ¶ 26 (Henry/Hendrick Opp'n App. 8).

ORC applied for a disbursement from the Fund in each of the last three years for the purpose of *(a)* creating a program that would provide direct support to pregnant women who have decided that adoption is the appropriate option given their circumstances, and *(b)* supporting counseling and associated training about adoption. All three of ORC's applications were denied by the OKDHS because ORC uses other monies (*i.e.*, financing from sources other than the Fund) to support abortion-related activities. Motorists' Pet. App. A, 36a n.20.

ORC alleges in Counts Five and Six of the First Amended Complaint that the eligibility criteria embodied in Sections 1104.6(C)(4) and 1104.6(D) are unconstitutional, because they impermissibly disqualify ORC for a disbursement from the Fund solely because ORC engages in separately financed protected speech activities with which the state disagrees. ORC seeks a declaration that conditioning disbursement of state funds on a putative recipient's complete abstention from "disfavored" speech activities is unconstitutional, so long as the disbursement would not be used to finance such activities. ORC also seeks an injunction against the continued enforcement of Sections 1104.6(C)(4) and 1104.6(D), and severance of those eligibility criteria from the remainder of Section 1104.6. First Am. Compl. ¶ 166 (Henry/Hendrick Opp'n App. 58).

ORC's requested relief would leave the remainder of Section 1104.6 intact. Indeed, if ORC prevails:

- The state still would be required to disburse any and all monies in the Fund at the beginning of each fiscal year in a pro rata share among all eligible organizations (47 Okla. Stat. § 1104.6(A); ORC Opp'n App. A, 1a); and

- Any decision as to an organization's eligibility for a disbursement (including ORC's eligibility) still would be made by the OKDHS pursuant to the remaining eligibility criteria (*Id.* § 1104.6(B); ORC Opp'n App. A, 1a); and

- All recipients (including ORC) still would be required—as Cross-Petitioners contend is the intent of the Oklahoma legislature—to use disbursements solely to finance adoption-related activities (*Id.* § 1104.6(D); ORC Opp'n App. A, 4a); and

- All recipients (including ORC) still would be required to return any unused funds at the end of each fiscal year (*Id.* § 1104.6(B); ORC Opp'n App. A, 1a); and

- All recipients (including ORC) still would be required to undergo an annual audit verifying that all disbursements were used to finance adoption-related activities in the manner prescribed by statute (*Id.* § 1104.6(F); ORC Opp'n App. A, 5a).

In describing ORC's requested relief, Cross-Petitioners inexplicably mischaracterize Counts Five and Six as seeking disbursements to finance abortion-related activities.[2] To the contrary, ORC challenges the statutory condition for receipt of state funding to be used for *adoption-related activities* on a recipient's certification that it does not engage in any—even separately financed—abortion-related activities.

Motorists, in contrast to ORC, are six Oklahoma resident-drivers who challenge the state's special license plate scheme—that is, the statutory provisions authorizing the sale of special license plates by the Oklahoma Tax Commission to those motorists who opt to purchase them. As described more fully in Motorists' petition, the Oklahoma legislature created through this scheme actual and potential viewpoint discrimination in a state-created private speech forum by impermissibly favoring the expression of certain views on special license plates. With respect to their claims set forth in Counts One through Four of the First Amended Complaint, Motorists seek a declaration that the special license plate scheme is unconstitutional because it violates the First and Fourteenth Amendments, and also seek an injunction against the scheme's continued enforcement. First Am. Compl. ¶¶ 164-65 (Henry/Hendrick Opp'n App.

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[2] *See* Cross-Pet. at 7-8 (stating that ORC's requested relief "demand[s] the federal courts to force the state to expend state tax money for a program the State has decided is not in the best interests of its citizens"); *id.* at 9 ("[ORC] want[s] the federal courts to either give them a share of the pie or else deny everyone else their share."); *id.* at 15 (ORC's requested relief "force[s] the state to fund a program its elected officials chose not to fund").

57-58). As such, Motorists' claims are entirely independent of ORC's claims, and whether Motorists ultimately prevail on Counts One through Four has no effect on whether ORC ultimately prevails on Counts Five and Six (and vice versa).

C. The District Court's Decision.

The district court dismissed Motorists' claims on the ground that they were barred by the Tax Injunction Act. As to ORC's claims, the district court held that:

> Because the fifth and sixth claims for relief involve the disbursement of funds rather than the collection of funds, the Court finds that the [Tax Injunction Act] does not bar the Court's jurisdiction as to them.

Motorists' Pet. App. B, 64a. The district court further held, in response to Cross-Petitioners' argument that they are immune from suit under the Eleventh Amendment, that for purposes of satisfying the *Ex parte Young* exception to a state's sovereign immunity: *(a)* ORC alleged non-frivolous violations of federal law; *(b)* Cross-Petitioners each had sufficient enforcement connection to the challenged eligibility criteria; and *(c)* ORC sought prospective equitable relief. Motorists' Pet. App. B, 66a-67a.

Despite having concluded that ORC met these well-established criteria for invoking the *Ex parte Young* exception to sovereign immunity, the district court proceeded to consider an additional factor that it believed

was required under the Tenth Circuit's Eleventh Amendment jurisprudence:

> "Because of the important interests of federalism and state sovereignty implicated by the *Ex parte Young* doctrine, the rule has its limits." *ANR Pipeline v. LaFaver*, 150 F.3d 1178, 1188 (10th Cir. 1998). The *Ex parte Young* doctrine will not apply where the requested relief could be said "impermissibly [t]o intrude upon the state's dignity and status as a sovereign government." *Harris v. Owens*, 264 F.3d 1282, 1293 (10th Cir. 2001).

Motorists' Pet. App. B, 68a. The district court understood the Tenth Circuit's instruction in its *ANR Pipeline v. LaFaver* and *Harris v. Owens* decisions to mean that Counts Five and Six must be dismissed if ORC's requested relief nonetheless implicates a "core" or "special" sovereignty interest. Motorists' Pet. App. B, 69a, 71a. The district court went on to conclude that *Ex parte Young* was not applicable to Counts Five and Six because ORC's "requested relief would interfere with the state's spending power, and because that power is a special sovereignty interest." Motorists' Pet. App. B, 70a-71a.

D. The Court of Appeals' Decision.

Both Motorists and ORC appealed the district court's dismissal of their respective claims. The court of appeals issued a unanimous decision dated March 6, 2007 affirming the dismissal of Motorists' claims (Counts One through Four) for lack of jurisdiction pursuant to the

Tax Injunction Act, but reversing the dismissal of ORC's claims and remanding to the district court Counts Five and Six.[3]

ORC argued on appeal that the district court's dismissal of its claims should be reversed because those claims are subject to the *Ex parte Young* exception to sovereign immunity and thus are not barred by the Eleventh Amendment. In response, Cross-Petitioners asserted that the dismissal of ORC's claims should be affirmed because ORC's requested relief implicates "special" sovereignty interests.

The court of appeals began its analysis of ORC's claims by describing *Ex parte Young*, 209 U.S. 123 (1908), as "perhaps the most significant" exception to sovereign immunity. Motorists' Pet. App. A, 38a. In doing so, Judge Gorsuch forthrightly acknowledged that the *Ex parte Young* exception is widely understood to embody the "legal fiction" that a suit satisfying certain formalisms (*i.e.*, a suit against state officials in their official capacities seeking only prospective relief for alleged violations of federal law) "is (somehow) different in substance than a suit against the state itself." Motorists' Pet. App. A, 39a. The court of appeals continued:

> In the suit before us, defendants do not dispute that claims five and six meet the *Ex parte Young* formalisms—that is, those claims seek

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[3] The court of appeals' decision as to Motorists' claims—and Motorists' and Cross-Petitioners' respective arguments on appeal as to Counts One through Four—are described in detail in Motorists' petition.

> prospective relief, no damages, and are directed (at least nominally) against state officials rather than the State of Oklahoma itself. Instead, defendants urge us to dismiss this suit on the basis of the new gloss added to *Young* by [*Idaho v.*] *Coeur d'Alene* [*Tribe of Idaho*, 521 U.S. 261 (1997)]. But this only raises the questions: What exactly did *Coeur d'Alene* do to the state of the Supreme Court's *Ex parte Young* jurisprudence? And what does *Coeur d'Alene* mean for this case?

Motorists' Pet. App. A, 41a. Both questions were correctly answered by the court of appeals' ensuing comprehensive analysis.

With respect to its first question, the court of appeals began with a description of *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), in which the Coeur d'Alene Tribe sought a declaratory judgment establishing "its entitlement to exclusive use and occupancy of submerged lands under Lake Coeur d'Alene[.]" Motorists' Pet. App. A, 42a. As Judge Gorsuch observed, "*Coeur d'Alene* involved multiple and fractured opinions" (Motorists' Pet. App. A, 42a) in which a majority was able to agree only that the Tribe's claims were barred by the Eleventh Amendment:

- Justice Kennedy, writing for himself and Chief Justice Rehnquist, suggested that, in determining whether to apply *Ex parte Young*, federal courts engage in a case-by-case analysis reflecting a "careful balancing and accommodation of state

interests." *Coeur d'Alene*, 521 U.S. at 274; *see also id.* at 270 (opining that not all federal suits that seek declaratory injunctive relief against state officials "must automatically be allowed to proceed under an exception to the Eleventh Amendment protection").

- Justice O'Connor, writing separately in a concurring opinion joined by Justices Scalia and Thomas, rejected Justice Kennedy's proposed case-by-case analysis. Nevertheless, Justice O'Connor agreed that the Tribe's claims were barred by the Eleventh Amendment because the requested relief (while formally seeking prospective relief) in substance sought to "quiet title to sovereign lands" and thus constituted a suit against the state. *Id.* at 296.

- In a dissenting opinion joined by Justices Ginsburg, Stevens, and Breyer, Justice Souter agreed with Justice O'Connor's rejection of Justice Kennedy's proposed case-by-case approach, but also expressed the view that the Tribe's action was not barred by the Eleventh Amendment. *See id.* at 298 (opining that Tribe's claims were "no more (or less) against the State than any of the claims brought in our prior cases applying [*Ex parte*] *Young*").

After acknowledging Justice O'Connor's opinion in *Coeur d'Alene* to be "the narrower approach commanding the fifth vote" that "provides the controlling guidance for lower courts," the court of appeals turned to its prior decision in *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178 (10th Cir. 1998). Motorists' Pet. App. A, 44a. Judge Gorsuch explained that the decision in *ANR Pipeline* was intended to be an application of Justice O'Connor's opinion in *Coeur d'Alene* "as best [the Tenth Circuit] understood it" (Motorists' Pet. App. A, 44a):

> In light of *Coeur d'Alene*, federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must then determine whether that requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment, such as a retrospective money judgment.

Motorists' Pet. App. A, 44a (quoting *ANR Pipeline*, 150 F.3d at 1190).

Next, the court of appeals turned to this Court's decision in *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). *Verizon Maryland* involved a dispute between telecommunications companies Verizon and MCI under an agreement that previously had been approved by the Maryland Public Service Commission. MCI filed a complaint with the Commission seeking to force Verizon to make payments allegedly owed under the agreement. After the Commission ordered Verizon to make certain

payments to MCI, Verizon filed an action in federal district court against the Commissioner (in his official capacity). Verizon sought a declaratory judgment that the order violated the Telecommunications Act of 1996, 47 U.S.C. §§ 151-614, and also sought an injunction against further enforcement of the Commission's order. The district court's dismissal of Verizon's action was affirmed by the Fourth Circuit, which held that *Ex parte Young* did not apply to Verizon's claims because the federal jurisdiction conferred by the Telecommunications Act permitting claims against a state public service commission unduly interfered with the state's sovereign immunity.

This Court reversed in a unanimous decision authored by Justice Scalia, holding that the *Ex parte Young* exception did in fact apply to Verizon's claims.[4] Judge Gorsuch observed below that *Verizon Maryland* involved review of a "Fourth Circuit decision articulating an approach to sovereign immunity that closely tracked [the Tenth Circuit's] approach in *ANR Pipeline*." Motorists' Pet. App. A, 45a. He further observed that the "formulation of *Coeur d'Alene* in *Verizon Maryland*" was "somewhat different from what [the Tenth Circuit] had understood it to be in *ANR Pipeline*" (Motorists' Pet. App. A, 46a):

> In rejecting the Fourth Circuit's analysis, the Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether "special"

[4] Justice O'Connor took no part in the consideration or decision of *Verizon Maryland*.

> or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought. Thus, to the extent that our decision in *ANR Pipeline* read *Coeur d'Alene* as requiring "federal courts [to] examine whether the relief sought against a state official 'implicates special sovereignty interests,'" we recognize today that *Verizon Maryland* abrogated this step. Instead, the Supreme Court has instructed that we are to proceed immediately in every case to the "straightforward [or so one might hope] inquiry" whether the relief requested is "properly" characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief.

Motorists' Pet. App. A, 46a. The court of appeals concluded:

> Following the Supreme Court's most recent and definitive guidance in *Verizon Maryland*, the sole question for us becomes whether the relief sought by ORC is prospective, not just in how it is captioned but also in its substance.

Motorists' Pet. App. A, 47a.

Having answered its first question (*i.e.*, the effect of the *Coeur d'Alene* decision on a court's *Ex parte Young* analysis), the court of appeals answered its second question (*i.e.*, whether the *Ex parte Young* exception

applies to ORC's claims) by analyzing ORC's requested relief:

> By its terms, ORC's complaint does not seek a money judgment for any past alleged infractions of federal law. Neither does it seek to impose any constraints on the State's ability to decide which specialty license plates to allow or disallow. Nor does it seek to dictate which programs the State may choose (or not choose) to fund with revenues from its specialty license plate scheme. . . . Viewing the facts in the light most favorable to ORC, we are unable to conclude that, were ORC to prevail, Oklahoma's specialty license plate program would be any less financially lucrative for the State, or that the State would be inhibited in any of its funding options, including its decision to collect and spend revenues in aid of adoption activities through the Choose Life Assistance Program.

Motorists' Pet. App. A, 47a-48a.

The court of appeals therefore concluded that ORC's requested relief satisfied the elements of the *Ex parte Young* exception, and reversed the district court's dismissal of Counts Five and Six, remanding ORC's claims to the district court. Motorists' Pet. App. A, 52a-53a.[5]

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[5] The court of appeals identified two limited circumstances under which the district court properly could revisit Cross-Petitioners' sovereign immunity defense: *First*, if discovery were

(Cont'd)

E. Relevant Proceedings on Remand.

Once back in the district court, Cross-Petitioner Henry filed a motion seeking to stay further proceedings as to ORC's claims in Counts Five and Six pending resolution of Motorists' petition for a *writ of certiorari* with respect to Counts One through Four. The district court denied that motion on August 31, 2007, a copy of which is reproduced herein as Appendix B (6a-12a), after concluding that "a stay is not appropriate or necessary in this case because [Motorists' claims] are distinct from [ORC's claims]." ORC Opp'n App. B, 7a. The district court further concluded that, unlike Cross-Petitioner Henry, "ORC would be harmed by a stay." ORC Opp'n App. B, 9a.[6]

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to reveal any facts suggesting that the relief requested by ORC in the First Amended Complaint constituted something functionally equivalent to an impermissible retrospective judgment; and *second*, to analyze any additional relief ORC may subsequently seek beyond that requested in the First Amended Complaint. Motorists' Pet. App. A., 52a-53a & n.35.

[6] The district court also denied Cross-Petitioner Henry's alternative motion to abstain permanently from deciding ORC's claims. Currently pending in the district court is a new round of motions to dismiss ORC's claims; those motions will be fully briefed by the end of 2007. Also pending is a decision—following supplemental briefing requested by the district court—as to the impact of the court of appeals' decision (if any) on numerous orders memorializing an agreement between ORC and all Cross-Petitioners to preserve the status quo in the Fund pending a final decision on ORC's claims. While the district court has not yet ruled on this issue, its resolution will not have any effect on the disposition of Counts Five and Six.

REASONS FOR DENYING THE PETITION

The crux of Cross-Petitioners' half-hearted conditional cross-petition is that the court of appeals reached the wrong conclusion in applying to ORC's claims this Court's well-established *Ex parte Young* exception to sovereign immunity. Tellingly, in asking this Court to grant the cross petition if—*and only if*—the Court grants Motorists' petition, Cross-Petitioners do not identify any conflict between the court of appeals' decision with regard to ORC's claims and this Court's prior decisions. Similarly, Cross-Petitioners do not identify any split among the circuit courts of appeals relating to the decision below. Nor do Cross-Petitioners raise any important question of federal law that has not been, but should be, settled by this Court.

To the contrary, Cross-Petitioners contend merely that the court of appeals should have considered in analyzing Counts Five and Six a factor that this Court previously addressed and rejected in determining whether to invoke the *Ex parte Young* exception to sovereign immunity. Unhappiness over a ruling below is not a compelling reason for further review by this Court. Moreover, any such review would only confirm that the court of appeals reached precisely the conclusion intended by *Ex parte Young*.[7]

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[7] In contrast, Motorists offer in their petition several independent and compelling reasons for granting a *writ of certiorari* as to Counts One through Four of the First Amended Complaint, including that the court of appeals' decision: *(a)* directly conflicts with at least one other circuit court; *(b)* is at odds with this Court's interpretation of the (Cont'd)

I. Cross-Respondent ORC's Claims Are Not Barred By The Eleventh Amendment.

A. The Tax Injunction Act Does Not Apply to Counts Five and Six.

Both the conditional cross-petition and the question presented (as crafted by Cross-Petitioners) suggest that the court of appeals' decision should be reversed because *Ex parte Young* cannot be invoked to hear claims otherwise barred by the Tax Injunction Act. Yet, such an argument rests necessarily on the underlying assumption that ORC's claims are barred by the Tax Injunction Act—an argument the district court rejected and the court of appeals deemed Cross-Petitioners to have waived on appeal. Motorists' Pet. App. A, 37a.

Even had Cross-Petitioners timely presented this argument on appeal, Counts Five and Six plainly are not barred by the Tax Injunction Act because, as the court of appeals correctly observed: "In claims five and six, ORC challenges not the *collection* of any tax but the

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Tax Injunction Act; and *(c)* presents important questions of first impression requiring this Court's attention both *(i)* to ensure that all motorists—and not just those residing in certain circuits—have direct access to a federal forum for resolution of important First and Fourteenth Amendment issues that are themselves the subject of a circuit split, and *(ii)* to prevent the Tax Injunction Act from becoming a means by which state legislatures can create viewpoint discriminatory private speech fora immunized from original federal jurisdiction.

manner in which money is *distributed* from the Fund." Motorists' Pet. App. A, 36a (emphases in original).[8]

The Tax Injunction Act expressly provides in relevant part that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. As explained in the Counter-Statement of Facts above, ORC does not ask the federal courts to do any of those things. ORC instead asks the district court to order Cross-Petitioners to disburse the amounts *already* earned by the state from sales of special license plates displaying the expression "choose life"—amounts that *already* have been deposited into the Fund—in a constitutional manner. Federal courts have consistently held that the Tax Injunction Act does not bar challenges to the use and disbursement of taxes already collected and held in the state's coffers.[9]

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[8] As explained in their petition, Motorists contend that the amount paid for the voluntary purchase of any special license plate and subsequently deposited into the Fund is not a "tax" for purposes of the Tax Injunction Act.

[9] *See, e.g., Oklahoma ex rel. Okla. Tax Comm'n v. Int'l Registration Plan*, 455 F.3d 1107, 1112 (10th Cir. 2006) (Tax Injunction Act does not apply to disputes regarding apportionment and distribution of tax revenue); *Pendleton v. Heard*, 824 F.2d 448, 451 (5th Cir. 1987) (observing that Tax Injunction Act is inapplicable to "suits challenging the distribution of tax money"); *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1177 (9th Cir. 1984) (Tax Injunction Act inapplicable to claims where requested relief is directed at state spending programs), *overruled on other grounds by Arakaki v. Lingle*, 477 F.3d 1048, 1062 (9th Cir. 2007); *Bd. of Educ. of Valley View Cmty. Unit Sch.*

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B. The *Ex parte Young* Exception Plainly Applies to ORC's Claims.

Cross-Petitioners do not quarrel with the court of appeals' analysis of *Ex parte Young* following this Court's decision in *Verizon Maryland*. Instead, Cross-Petitioners appear to suggest that the court of appeals erred by not asking as part of its *Ex parte Young* analysis whether ORC's requested relief would "affect a State function"—asserting that, if it does, "then the legal fiction of *Ex parte Young* should not be applicable." Cross-Pet. at 14. Yet, this Court has already rejected—first in *Coeur d'Alene* and again in *Verizon Maryland*—the proposition that a court's *Ex parte Young* analysis requires consideration of the effect that a plaintiff's requested relief may have on "core" or "special" sovereignty interests. As the court of appeals concluded:

> [Cross-Petitioners] appear[] to wish the law were otherwise, pursuing arguments that track to a significant degree the sort of case-specific analysis of the state interests at stake that the Fourth Circuit pursued in *Verizon*

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Dist. No. 365U v. Bosworth, 713 F.2d 1316, 1319-20 (7th Cir. 1983) (Tax Injunction Act inapplicable where requested relief involves distribution of collected taxes); *Levy v. Parker*, 346 F. Supp. 897, 899 (E.D. La. 1972) (Tax Injunction Act does not apply to challenges to state "provisions, statutes and practices that determine the manner of distributing state funds"), *aff'd*, 411 U.S. 978 (1973); *see also* 17A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4237 at 287-88 & nn.73-74.

> *Maryland.* But we are bound by the law as it is, not as [Cross-Petitioners] might wish it to be.

Motorists' Pet. App. A, 46a.

Even if the "affecting a State function" factor posed by Cross-Petitioners were appropriate in a court's *Ex parte Young* analysis, as explained by the court of appeals and discussed above, ORC's requested relief would not affect Oklahoma's taxation or spending functions. ORC's requested relief relates to eligibility for disbursement of state monies already collected, and thus does not impact in any way on the state's taxation powers. Similarly, ORC's requested relief would neither infringe on the state's power to finance certain activities (such as adoption-related activities), nor infringe on the state's power to refuse to finance other activities (such as abortion-related activities), but rather would simply excise an unconstitutional condition on the receipt of funds that the state has already chosen to expend for adoption-related services.

Further, even if by some stretch ORC's requested relief fairly could be characterized as "affect[ing] the state's ability to tax and spend its own revenue" (Cross-Pet. at 15), the court of appeals correctly observed that the relief sought here bears no similarity to the type of relief sought in *Coeur d'Alene*.[10] Motorists' Pet. App. A,

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[10] *Coeur d'Alene* is widely acknowledged to be an extreme and unusual case that is sharply limited by its facts. *See, e.g., Duke Energy Trading & Mktg., LLC v. Davis*, 267 F.3d 1042, 1054 n.8 (9th Cir. 2001) ("The extent to which *Coeur d'Alene* is (Cont'd)

48a. ("Nothing in ORC's suit calls to mind the sort of literal land grab effort made by the plaintiffs in *Coeur d'Alene* . . . ."). Nor is ORC's requested relief comparable to that sought in *ANR Pipeline*, a case in which the Tenth Circuit—prior to having the benefit of this Court's decision in *Verizon Maryland*—considered in its *Ex parte Young* analysis the effect of requested relief on state sovereignty interests. *ANR Pipeline* involved claims brought by natural gas pipeline companies requesting favorable tax treatment comparable to that provided by the Kansas legislature to railroad companies. The pipeline companies sought declaratory and injunctive relief requiring the state to "recertify" the pipelines' tax assessments "for subject and future tax years." 150 F.3d at 1185. The Tenth Circuit concluded that such relief would be tantamount to a rewriting of the state property tax code and, accordingly, as "'fully as intrusive' into the state's sovereignty as would be a retroactive money judgment against excessive property

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limited to its particular and special circumstances cannot be overstated.") (internal quotation marks and citation omitted); *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 496 n.6 (10th Cir. 1998) (observing that *Coeur d'Alene* bars *Ex parte Young* exception only in "unique circumstances"); *see also* Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH & LEE L. REV. 493, 545 n.259 (Spring 2006) ("*Verizon Maryland* reaffirmed *Ex parte Young* notwithstanding the exception for submerged tribal lands articulated in *Coeur d'Alene*."); Carlos Manuel Vazquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 48 (October 1998) (*Coeur d'Alene* created an exception to *Ex parte Young* only "for suits challenging on federal grounds a state's claim to property").

taxes." *Id.* at 1194 (quoting *Coeur d'Alene*, 521 U.S. at 287); *see also id.* n.17 (requested relief could "impose a drain on the [state] treasury"). ORC's requested relief is easily distinguishable, because Section 1104.6 requires the OKDHS to disburse all monies in the Fund at the beginning of each fiscal year. As a result, the possibility that a greater number of applicants may become eligible for disbursements if the challenged eligibility criteria are stricken would not require the state to spend any more money under the Choose Life Assistance Program than it is required to spend today.

Cross-Petitioners also appear to contend, somewhat obliquely, that a federal court would exceed its authority by granting ORC's requested relief because such relief would impermissibly "interfere with the State's exercise of its internal affairs." Cross-Pet. at 12. To support their contention, Cross-Petitioners cite this Court's instruction in *Rizzo v. Goode*, 432 U.S. 362 (1976), that federal courts must be "constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." Cross-Pet. at 12 (internal quotation marks omitted). That reliance is misplaced.

Rizzo involved claims brought by private individuals and organizations against various city officials pursuant to 42 U.S.C. § 1983 alleging a pervasive pattern of illegal and unconstitutional mistreatment of minority citizens by Philadelphia city police. The Third Circuit affirmed a district court order requiring plaintiffs to submit, for the court's subsequent approval, a comprehensive program for the city's handling of citizen complaints of mistreatment by city police. The program was to be

formulated in accordance with guidelines prepared by the district court for revising the police manual and relevant procedural rules. In reversing the Third Circuit's decision, this Court held that the injunctive relief awarded by the courts below constituted an unwarranted federal judicial intrusion into the discretionary authority of local officials to perform their official functions as prescribed by local law. 432 U.S. at 378-81.

ORC's claims and requested relief are patently distinguishable from those in *Rizzo*. ORC challenges specific statutory eligibility criteria and seeks a straightforward injunction against further enforcement of those criteria. *See Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1366 (9th Cir. 1977) (acknowledging that, although principles of federalism counsel against intrusion into the executive branch of state government, "prohibitory injunctive relief against the enforcing officers is allowed" under *Ex parte Young*), *aff'd sub nom in part and rev'd in part, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Moreover, for all of the reasons explained above, the injunction sought by ORC would not in any way "intrude" on Oklahoma's taxation or spending powers.

In sum, that ORC's requested relief will prevent Oklahoma from conditioning state funding for adoption-related activities on relinquishment of a recipient's right to engage in privately financed abortion-related activities simply does not render it the functional equivalent of any form of relief barred by *Ex parte*

Young. It is wholly consistent with the principles of federalism and comity embodied in *Ex parte Young* for ORC's claims to proceed in the district court.

II. The Conditional Cross-Petition Does Not Identify Any Valid Alternative Reason For Reversing The Court of Appeals' Decision As To Cross-Respondent ORC's Claims.

A. ORC Has Standing to Assert its Claims.

Cross-Petitioners assert in a single sentence (without any analysis or legal support) that "ORC also lacked the standing to be granted the relief they are requesting" because "ORC has no right to the state funds they are requesting." Cross-Pet. at 9. This argument was never presented to the court of appeals and, more importantly, is readily belied by both the plain language of ORC's requested relief and the court of appeals' holding that ORC's claims are ripe for adjudication.

First, Cross-Petitioners' assertion is premised on their erroneous, yet oft-repeated, representation that Counts Five and Six ask the federal courts to order a disbursement from the Fund to ORC for abortion-related activities. To the contrary, ORC challenges the provisions of the statute that condition receipt of monies for adoption-related activities from the Fund on a recipient's certification that it does not engage in any—even separately funded—abortion-related activities. With respect to funding for adoption-related activities, which the state has plainly authorized, ORC's requested relief does not ask the federal courts to reach a determination as to ORC's—or any other organization's—compliance

with the statutory eligibility criteria. Whether any organization—including ORC—ultimately receives a disbursement from the Fund rests solely on whether the OKDHS concludes that the organization satisfies the remaining eligibility criteria after Sections 1104.6(C) and 1104.6(D) have been severed. And, of course, all recipients would continue to be required to use disbursements from the Fund only for the finance of adoption-related activities.

Second, ORC already has applied for and been denied a disbursement for its adoption-related activities on three occasions. The denials were based on ORC's failure to satisfy the eligibility criteria currently set forth in Section 1104.6 requiring an applicant to attest that it does not engage in any abortion-related activities. In addition to demonstrating that ORC's claims are ripe for adjudication (*see* Motorists' Pet. App. A, 11a-12a), these facts unquestionably establish that—pursuant to this Court's tri-part standing analysis in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)—ORC has standing to assert Counts Five and Six.[11] Specifically:

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[11] This Court explained in *Lujan* that "the irreducible constitutional minimum of standing" consists of three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent

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(a) ORC sustained an actual injury when it was denied funding for adoption-related activities solely because it engages in separate abortion-related activities; *(b)* ORC's injury was caused by enforcement of Sections 1104.6(C)(4) and 1104.6(D); and *(c)* ORC's injury will be remedied by granting the relief requested in Counts Five and Six regardless of whether ORC is ultimately deemed eligible for a disbursement from the Fund after the challenged eligibility criteria have been severed.

B. ORC's Claims Are Not Barred by the Tenth Amendment.

Finally, the conditional cross-petition refers off-handedly to the Tenth Amendment without any further analysis. *See* Cross-Pet. at 11. To the extent Cross-Petitioners are attempting belatedly to argue that ORC's claims are barred by the Tenth Amendment, the argument fails as a matter of law.

The Tenth Amendment embodies the principle that, "at the time the Constitution was adopted, th[e] powers not granted to the United States were reserved to the States or to the people." *United States v. Sprague*, 282 U.S. 716, 733 (1931). Federal courts typically encounter Tenth Amendment claims in actions alleging that Congress has acted outside of the powers delegated to

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> action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560 (internal citations and quotation marks omitted).

it in the Constitution. In contrast, Tenth Amendment "defenses" typically have been rejected by federal courts in actions brought against state officials in their official capacities for alleged violations of federal law. This is because the power "to order state officials to comply with federal law" is plainly conferred on federal courts by Article III. *New York v. United States*, 505 U.S. 144, 179 (1992); *see also Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 829 (10th Cir. 2007).

ORC alleges that the challenged eligibility criteria infringe on rights secured by the First and Fourteenth Amendments. Through Counts Five and Six, ORC asks the federal courts to order compliance with federal law by precluding Cross-Petitioners from further enforcing those challenged criteria. Because that power is indisputably delegated to the federal courts under Article III, ORC's claims do not implicate any Tenth Amendment concerns.

CONCLUSION

For the reasons stated above, this Court should deny the conditional cross-petition for a *writ of certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

TITLE 47 - MOTOR VEHICLES
CHAPTER 74 - OKLAHOMA VEHICLE LICENSE AND REGISTRATION ACT
SECTION 1104.6

Section 1104.6. Choose Life Assistance Program Revolving Fund - Applications for funds - Restrictions on use of funds.

A. Twenty Dollars ($20.00) of the fee authorized by Section 14 of this act for Choose Life license plates shall be deposited to the Choose Life Assistance Program created in subsection B of this section.

B. There is hereby created in the State Treasury a revolving fund for the Department of Human Services to be designated the Choose Life Assistance Program. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all the monies received by the Department of Human Services pursuant to the provisions of Section 14 of this act. All monies accruing to the credit of the fund are appropriated and shall be distributed at the beginning of each fiscal year in a pro rata share to all nonprofit organizations that provide services to the community that include counseling and meeting the physical needs of pregnant women who are committed to placing their children for adoption. Any unused funds in excess of

ten percent (10%) of the funds allocated to a nonprofit organization shall be returned to the Choose Life Assistance Program Revolving Fund at the end of the fiscal year to be aggregated and distributed with the next fiscal year distribution.

C. To apply for and receive the funds available through the Choose Life Assistance Program, an organization must deliver to the Department of Human Services an affidavit signed by a duly appointed representative of the organization that states the following:

1. The organization is a nonprofit organization;

2. The organization does not discriminate for any reason, including, but not limited to, race, marital status, gender, religion, national origin, handicap or age;

3. The organization counsels pregnant women who are committed to placing their children for adoption;

4. The organization is not involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising;

Appendix A

5. The organization does not charge women for any services received;

6. The organization understands that sixty percent (60%) of the funds received by an organization can only be used to provide for the material needs of pregnant women who are committed to placing their children for adoption, including clothing, housing, medical care, food, utilities, and transportation. Such funds may also be expended on infants awaiting placement with adoptive parents. Forty percent (40%) of the funds may be used for adoption, counseling, training, or advertising, but may not be used for administrative expenses, legal expenses, or capital expenditures.

7. The organization understands that no funds may be used for administrative expenses, legal expenses, or capital expenditures;

8. The organization understands that any unused funds at the end of the fiscal year that exceed ten percent (10%) of the funds received by the organization during the fiscal year must be returned to the Choose Life

Assistance Program Revolving Fund to be aggregated and distributed with the next fiscal year distribution; and

9. The organization understands that each organization that receives such funds must submit to an annual audit of such funds verifying that the funds received were used in the manner prescribed by statute.

D. Funds may not be distributed to any organization that is involved or associated with abortion activities, including counseling for or referral to abortion clinics, providing medical abortion–related procedures, or pro-abortion advertising, and funds may not be distributed to any organization that charges women for services received.

E. Sixty percent (60%) of the funds received by an organization can only be used to provide for the material needs of pregnant women who are committed to placing their children for adoption, including clothing, housing, medical care, food, utilities, and transportation. Such funds may also be expended on infants awaiting placement with adoptive parents. Forty percent (40%) of the funds may be used for adoption, counseling, training, or advertising, but may not be used for administrative expenses, legal expenses, or capital expenditures.

F. Each organization that receives funds must submit to an annual audit of such funds verifying that the funds received were used in the manner prescribed in this section.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED AUGUST 31, 2007

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Case No. 04-CV-0028-CVE-PJC

HAROLD E. HILL, et al.,

Plaintiffs,

v.

THOMAS E. KEMP, et al.,

Defendants.

OPINION AND ORDER

Before the Court is the Motion to Stay or In the Alternative to Abstain (Dkt. # 119) filed by defendant Brad Henry ("Henry"). Plaintiffs have expressed an intent to file a petition for writ of certiorari with the United States Supreme Court[1] regarding the Tenth Circuit decision dated March 6, 2007, *see* Dkt. # 85.

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1. Plaintiffs were granted an extension of time to August 30, 2007 to file the petition for writ of certiorari. The petition need only be postmarked by August 30, 2007; it need not be filed with the Supreme Court by that date. Thus, at this time, the Court cannot verify if plaintiffs have filed the petition.

Appendix B

Defendant Henry asks the Court to stay the remaining claims (claims five and six) pending the outcome of plaintiff's appeal. In the alternative, Henry asks that the Court abstain from rendering a decision on claims five and six based on the following abstention doctrines: (1) *Pullman* abstention; (2) *Burford* abstention; (3) *Younger* abstention, and (4) *Colorado River* abstention. Plaintiffs object to Henry's motion. *See* Dkt. # 128. For the reasons set forth below, the Court denies defendant Henry's motion.

I.

The Court has discretion in determining whether to grant a stay. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Henry argues that a stay is appropriate because it will conserve judicial resources and because the claims on appeal deal with "the same issues, facts, and parties." Dkt. # 119, at 7. However, contrary to Henry's assertion, the Court finds that a stay is not appropriate or necessary in this case because the issues and parties in claims one through four are distinct from those in claims five and six.

The First Amended Complaint (Dkt. # 45) distinguishes between two sets of plaintiffs, the "Motorists" and Oklahoma Religious Coalition for Reproductive Choice Education Fund, Inc. ("ORC"). In claims one through four, the Motorists challenge the statutory provisions by which all special license plates are authorized for creation and sale to Oklahoma motorists. They argue that the special license plate

scheme unconstitutionally creates impermissible actual and potential viewpoint discrimination in a state-created public forum. This Court held that the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA") barred Motorists' claims one through four. The Tenth Circuit affirmed this decision. *See Hill v. Kemp,* 478 F.3d 1236 (10th Cir. 2007). It is this affirmance that would be the subject of a petition for writ of certiorari.

By contrast, in claims five and six, ORC challenges the statutory provisions establishing eligibility criteria for distribution of monies received from sales of the "Choose Life" license plate. This plate costs $35 in addition to the normal licensing charges. OKLA. STAT. tit. 47, §§ 1135.5(C). Of the $35 charge, $20 is directed to "a revolving fund for the Department of Human Services [("DHS")] to be designated the Choose Life Assistance Program" (the "Fund"), *id.* § 1104.6(B). By statute, "[a]ll monies accruing to the credit of the fund are appropriated and shall be distributed at the beginning of each fiscal year in a pro rata share to all nonprofit organizations that provide services to the community that include counseling and meeting the physical needs of pregnant women who are committed to placing their children for adoption." *Id.* § 1104.6(B). To receive disbursements from the Fund, an applicant organization must submit an affidavit verifying, among other things, that the organization "is not involved or associated with any abortion activities, including counseling for or referrals to abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." *Id.* § 1104.6(C)(4). ORC alleges that the eligibility

criteria set forth in § 1104.6(C)(4) and § 1104.6(D) unconstitutionally condition state funding on abstention from privately-funded speech in violation of the First Amendment. This Court held that, with respect to claims five and six, the suit was barred by the Eleventh Amendment. The Tenth Circuit reversed and remanded those claims to this Court. *See Hill*, 478 F.3d at 1254-62.

The Tenth Circuit has set forth several factors to consider in determining whether to grant a stay pending a decision on the merits of an appeal: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to opposing parties if the stay is granted; and (4) any risk of harm to the public interest. *Fed. Trade Comm. v. Mainstream Marketing Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis*, 299 U.S. at 255. Here, Henry has failed to illustrate the threat of irreparable harm or a "clear case of hardship" if the stay is not granted. Given that the claims involve different issues and different sets of plaintiffs, a stay would do little to conserve resources for either the Court or litigants. The outcome of Motorists' claims on appeal (if the Supreme Court grants certiorari) have no bearing on the outcome of ORC's claims on remand. Further, the Court finds that ORC would be harmed by a stay. To the extent that ORC contends that it is entitled to disbursements from the

Fund, a stay would delay the distribution of ORC's pro rata share if it is successful on the merits. Therefore, the Court denies Henry's motion to stay.

II.

In the alternative, Henry asks that the Court abstain from further deciding ORC's claims. The Court notes that this case was filed in early 2004. Abstention was not raised by any defendant until Henry's recent motion — more than three years after litigation commenced. For the reasons set forth below, the Court finds that abstention would be improper.

1. *Pullman* Abstention

According to the *Pullman* abstention doctrine, abstention is required when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary. *See generally Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941). In such cases, a federal court should abstain from resolving federal constitutional questions until the matter has been sent to state court to clarify the state law. A district court can abstain under *Pullman* only if the following three conditions are satisfied: "(1) an uncertain issue of state law underlies the constitutional claim; (2) the state law issues are amenable to interpretation and such an interpretation obviates the need or substantially narrow the scope of the constitutional claim; (3) an incorrect decision of state law by the district court would hinder important state law

policies." *Leahman v. City of Louisville*, 967 F.2d 1474, 1478 (10th Cir. 1992). *Pullman* abstention would be inappropriate in this case because this case simply does not involve uncertain issues of state law. See id. This case involves federal constitutional issues and not issues of state law.

2. *Burford* Abstention

Burford abstention arises when a federal district court faces issues that involve complicated state regulatory schemes. *See generally Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). It is generally invoked in non-federal question cases. Even defendant Henry admits that application of the *Burford*, abstention doctrine is "tenuous to the facts in this case." Dkt. # 119, at 5.

3. *Younger* Abstention & *Colorado River* Abstention

Under the *Younger* abstention doctrine, federal courts should abstain from granting relief against a pending state criminal proceeding or against a pending state civil proceeding that implicates important state interests. *See generally Younger v. Harris*, 401 U.S. 37 (1971). Under the *Colorado River* abstention doctrine, federal courts should refrain from hearing cases that are duplicative of a pending state court proceeding. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). There are no parallel state court proceedings in this case. Thus, quite clearly, neither the *Younger* nor *Colorado River* abstention doctrine applies.

In summary, the Court finds that all of the abstention doctrines cited by Henry are wholly inapplicable to this case. Even Henry fails to explain why the Court should abstain from making determinations as to claims five and six. His brief is, in effect, an overview of the abstention doctrines with little to no analysis as to their relevance to this case. Therefore, the Court finds that Henry's motion to abstain should be denied.

IT IS THEREFORE ORDERED that the Motion to Stay or In the Alternative to Abstain (Dkt. # 119) filed by defendant Brad Henry is hereby **denied.**

IT IS FURTHER ORDERED that the parties shall submit a proposed scheduling order setting forth a discovery deadline, dispositive motion deadline, and other relevant deadlines no later than **September 17, 2007.**

DATED this 31st day of August, 2007.